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Panel on Information Technology and Broadcasting

Meeting on 14 January 2013

**Background brief on the review of the
Control of Obscene and Indecent Articles Ordinance**

Purpose

This paper describes the regulatory regime for the control of obscene and indecent articles under the Control of Obscene and Indecent Articles Ordinance ("COIAO") (Cap. 390), and gives a summary of concerns raised by Members on issues relating to the control of obscene and indecent articles during previous discussions.

The regulatory regime under the COIAO

2. The COIAO regulates the publication and public display of obscene and indecent articles. The term "article" as defined in the COIAO includes any thing consisting of or containing material to be read and/or looked at, any sound-recording, and any film, videotape, disc or other record of a picture or pictures. Articles published on the Internet are also subject to the regulation of the COIAO. Nevertheless, the COIAO does not apply to films which are subject to censorship under the Film Censorship Ordinance (Cap. 392) and television broadcasts regulated under the Broadcasting Ordinance (Cap. 562).

3. Under the COIAO, "obscenity" and "indecent" include violence, depravity and repulsiveness. An article may be classified as one of the following three classes:

- (a) Class I article (neither obscene nor indecent) which may be published or sold without restriction;

(b) Class II article (indecent) which must not be published or sold to persons under the age of 18 and, when published or sold, must carry a statutory warning notice and be sealed in a wrapper; or

(c) Class III article (obscene) which is prohibited from publication.

4. Obscene Articles Tribunal ("OAT") is set up under the COIAO as part of the Judiciary to classify submitted articles. They have exclusive jurisdiction to determine for the purposes of the COIAO whether any article is obscene or indecent or neither, and any publicly displayed matter is indecent. OAT comprises a presiding magistrate and two or more members drawn from a panel of adjudicators who are ordinary members of the public appointed by the Chief Justice. Currently, there is a pool of some 500 adjudicators serving OAT.

5. In classifying an article, OAT should have regard to:

(a) the standards of morality, decency and propriety that are generally accepted by reasonable members of the community;

(b) the dominant overall effect of an article or matter;

(c) the persons, classes of persons, or age groups intended or likely to be targeted by an article's publication;

(d) in the case of matter publicly displayed, the location of such display and the persons, classes of persons, or age groups likely to view it; and

(e) whether the article or matter has an honest purpose or whether it seeks to disguise unacceptable material.

6. The maximum penalty for the publication of an obscene article (Class III) is a fine of \$1 million and imprisonment for 3 years. The maximum penalty for the publication of an indecent article (Class II) is a fine of \$400,000 and imprisonment for 12 months on first conviction; and a fine of \$800,000 and imprisonment for 12 months on a second or subsequent conviction. The COIAO does not set out factors which the court should take into consideration when meting out a penalty and the court has full discretion to determine the level of penalty in individual cases.

7. The COIAO is enforced by the Office for Film, Newspaper and Article Administration ("OFNAA") (formerly known as the Television and

Entertainment Licensing Authority ("TELA"), the Hong Kong Police Force ("the Police") and the Customs and Excise Department ("C&ED"). OFNAA monitors all articles (including free newspapers) published in the market, and refers any article suspected of contravening the COIAO to the OAT for classification after consideration of those factors mentioned in paragraph 5(c) and (d) above. Appropriate follow-up actions, including prosecution, will be taken against articles classified as indecent or obscene. The Police mainly deals with the sale of articles at wholesale and retail outlets such as video and computer shops, while C&ED intercepts articles at border checkpoints while carrying out copyrights enforcement work.

8. OFNAA also deals with indecent articles transmitted on the Internet through monitoring websites and following up on complaints. Together with the Hong Kong Internet Service Providers Association ("HKISPA"), the then TELA had developed a self-regulatory Code of Practice in October 1997 to provide guidance for Internet service providers ("ISPs") on the handling of obscene and indecent materials published on the Internet. The Police and HKISPA may block access to or remove obscene articles from the Internet and prosecute those responsible for the breach.

Previous discussions

9. There had been wide public concern about the dissemination of obscene and indecent materials in print media such as entertainment magazines and the new media such as the Internet. Questions on the classification criteria and the enforcement of COIAO were raised at Council meetings in recent years. Related issues (e.g. protection of young people from exposure to objectionable materials, enforcement and penalty, etc.) were also discussed at the Panel on Information Technology and Broadcasting ("the ITB Panel") in the past years.

Review of Control of Obscene and Indecent Articles Ordinance

First round of public consultation on the review of COIAO

10. In response to public concern over the prevalence of indecent and obscene articles in various media and the operation of the regulatory regime, the Administration commenced a comprehensive review of COIAO in 2008 and proposed two rounds of public consultation. The first round of public consultation was conducted from 3 October 2008 to 31 January 2009, during which members of the public were engaged extensively to discuss the following main issues relating to the operation of COIAO and possible improvement measures:

- (a) definition;
- (b) adjudication system;
- (c) classification system;
- (d) new forms of media;
- (e) enforcement;
- (f) penalty; and
- (g) publicity and public education.

11. Subsequent to the launch of the first round of public consultation exercise on the review of COIAO on 3 October 2008, the ITB Panel held two meetings to receive public views on the subject in November 2008 and January 2009. 85 groups/individuals gave views to the Panel on related issues concerning women, youth, information technology, education, press and publication, culture and arts, civic rights, and social morals. The Panel noted that the community had divergent views on the review of COIAO. Some deputations strongly objected to mandatory filtering by ISPs and tightening of Internet control, for fear that this would jeopardize freedom of expression and free flow of information. Some deputations considered that the consultation/review should be discontinued and more resources should be used instead to step up sex education for young people to help them develop a positive and healthy attitude towards sex. Some other deputations, however, called for tighter controls on obscene and indecent materials.

12. Some members of the ITB Panel opined that the Administration should strike a balance between protecting the youth from indecent and obscene materials on one hand and preserving the free flow of information and the freedom of expression on the other in reviewing COIAO. Given the transient and extraterritorial nature of the massive information flow on the Internet which would not be subject to the laws of Hong Kong, some members called on the Government to carefully address the legal and technical problems involved in Internet control. The Administration noted the views expressed by deputations and Panel members and undertook to further discuss with the ITB Panel when proposals were ready for the second round of public consultation.

13. On 13 July 2009, the ITB Panel noted that the Government had commissioned an independent Consultant to help organize public engagement activities and compile/analyse the views collected through the various channels during the first round of public consultation. The Consultant had submitted to the Administration a report on the first round of public consultation (LC Paper No. CB(1)2180/08-09(05) issued on 8 July 2009). A summary of the major findings of the first round of public consultation prepared by the Administration is at the **Appendix**.

14. Regarding the consultation findings on the adjudication system, some members of the ITB Panel considered that it was not appropriate for OAT to carry out both the administrative and judicial functions. These members supported the removal of the administrative classification function from OAT, and urged the Administration to discuss with the Judiciary to improve the operation of OAT.

15. The Administration advised that views collected in the first round of public consultation would be consolidated and analyzed for drawing up more concrete proposals for the second round of public consultation. Regarding OAT's dual role of performing both administrative and judicial functions, the Administration would discuss with the Judiciary and relevant stakeholders to improve the adjudication system and the operation of OAT.

Second round of public consultation on the review of COIAO

16. On 16 April 2012, the Government launched the second round of public consultation on the review of COIAO. According to the Administration, the first round of consultation confirmed general support for retaining the regulatory regime under COIAO and imposition of heavier penalties for breaches to enhance its deterrent effect. In the second round of consultation, the Administration would consult the community on the outstanding issues: the extent to which the maximum penalties under the current regime should be raised, and how the institutional set-up of OAT should be reformed. On the latter issue, the Administration was inviting comments on the two options to reform OAT institutional set-up which sought to address the Judiciary's fundamental concerns of requiring OAT to perform both administrative classification and judicial determination functions.

17. At the ITB Panel meeting on 14 May 2012, some members objected to the first option which involved the setting up of a statutory classification board and a statutory appeal panel to carry out the administrative classification function. These members preferred the second option which sought to abolish the administrative classification function.

18. Some Panel members opined that the term of office of the adjudicators of OAT should be shortened, so that the composition of the adjudicators would be changed more frequently to provide plurality, and would more accurately reflect the prevailing public standards of morality. According to the Administration, adjudicators were recruited through open invitation of the Commerce and Economic Development Bureau. Eligible

persons from all walks of life could apply to become adjudicators. The Judiciary had been improving the existing operations of OAT in response to public concerns. To enhance the representativeness of OAT adjudicators and to allow more opportunities for members of the public to serve as adjudicators, the Judiciary decided in 2010 to increase the total number of adjudicators from 280 to 500 and to apply the nine-year rule in the re-appointment of serving adjudicators.

Latest position

19. The Administration will brief the Panel on 14 January 2013 on the findings of the second round of public consultation on the review of COIAO.

Relevant papers

20. A list of the relevant papers with their hyperlinks is at: http://www.legco.gov.hk/yr11-12/english/panels/itb/papers/itb_b.htm.

Council Business Division 4
Legislative Council Secretariat
8 January 2013

A summary of major findings of the first round of public consultation on the review of the Control of Obscene and Indecent Articles Ordinance

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Views collected in the Public Opinion Survey

9. The Public Opinion Survey was conducted in January 2009 by the Public Opinion Programme at the University of Hong Kong ("HKUPOP") to gauge the public's knowledge of and views towards the Ordinance. Target respondents were the Cantonese-speaking population aged 15 or above and about 1 500 of them responded, representing 64.3% of the sample covered. The major findings are summarised as follows (these are the views received in the Public Opinion Survey and do not represent the position of the Government) -

- (a) the respondents' knowledge of the Ordinance is fair;
- (b) over 80% of the respondents considered that legislation was needed to regulate the publication of articles, and some 60% of the respondents considered the existing three-tier classification system under the Ordinance appropriate;
- (c) most respondents (i.e. over 90%) were aware of the existence of the Obscene Articles Tribunal ("OAT") but only less than one-tenth regarded the work of the OAT as "well done" and nearly half of them regarded its effectiveness to be "neither good nor bad";
- (d) among the six proposals for improving the adjudication system listed in the consultation document, the respondents seemed to be highly supportive of increasing the number of adjudicators in each hearing and requiring each hearing to include adjudicators from specified sectors. Both proposals captured almost 80% support. About 60% of respondents supported the establishment of a new independent adjudication system and the replacement of adjudicators by jurors. About 40% of the respondents were in favor of the

abolition of the OAT and the classification of articles by a magistrate while another 40% were in opposition;

- (e) as regards the regulation of the Internet, three-quarters of the respondents urged the Government to step up its regulation, mainly to improve the existing regulatory system and to increase the penalty;
- (f) three-quarters of the respondents considered that the court should increase the penalty for violating the Ordinance; and
- (g) nearly three-quarters of the respondents considered that the Government should educate the public through television.

Views collected from other channels and the Consultant's recommendations

10. Having consolidated and analysed the views collected, the Consultant concludes that views on different issues are highly diverse and no consensus has been reached. It is only on the importance of publicity and public education that members of the public are close to a consensus. Nevertheless, the Consultant considers that the views collected have provided valuable insight for the Government to draw upon as it develops concrete proposals to improve the regulatory regime and other issues for inclusion in the second round of public consultation. The analysis and recommendations of the Consultant are summarised below which do not represent the position of the Government.

(a) Need of the Ordinance

11. While some members of the public had reservations on the need for the Ordinance at all and taking the view that it might hinder the free flow of information, others considered that there was a need to keep the Ordinance and there was no apparent support for an overall abolition of the Ordinance. The Consultant suggests the Government should continue to encourage further public discussions with a view to exploring a set of standards generally acceptable by members of the public.

(b) Definitions

12. Currently, the Ordinance provides that "obscenity" and "indecentcy" include "violence, depravity and repulsiveness". There were

considerable public discussions on the definitions, and public views collected are diverse. Some members of the public supported expanding the definitions so that the public would know clearly under what circumstances one might breach the law. However, they also agreed that it would be impractical to list out all possible situations. On the other hand, some considered that the existing definitions were adequate and the Government should not be too prescriptive in interpreting terms like “obscenity” and “indecent” in the legislation to avoid inflexibility. They would prefer the Government to consider establishing a set of administrative guidelines for the public and stakeholders instead.

13. The Consultant considers that there must be support and understanding from the majority of the public before a decision can be made on whether and how to amend the definitions of “obscenity” and “indecent”. The Consultant further suggests that the Government should carefully consider the public views and draw up recommendations for discussions in the second round of public consultation.

(c) Adjudication System

14. Members of the public have expressed concerns about the transparency and representativeness of the OAT¹ as well as the consistency in OAT’s rulings. There were a lot of discussions on various measures to improve the operation of the OAT, which included increasing the total number of adjudicators of the OAT, increasing the number of adjudicators at each hearing, selecting adjudicators from different sectors and inviting jurors as adjudicators. Many people supported increasing the number of adjudicators at each hearing, e.g. from two to four at interim hearing, and from four to six at full hearing.

15. The Judiciary and some members of the legal profession have proposed to remove the administrative classification function from the OAT, leaving it to deal with judicial determinations² only, and to replace

¹ Currently, the OAT, a judicial body presided over by a magistrate and comprising adjudicators appointed by the Chief Justice, has exclusive jurisdiction in classifying articles. Those who are ordinarily resident in Hong Kong and have been so resided for seven years and are proficient in written English or Chinese are eligible for appointment as adjudicators. There are now around 300 adjudicators.

² - It is an **administrative function** for the OAT to perform its statutory duty to make an interim classification and, upon appeal, a final classification on a submitted article. In performing such classification duty, the OAT does not possess the power and authority of a court.

- The OAT is also required to perform a **judicial function**. Upon referral by a court or a magistrate arising from a civil or criminal proceeding, the OAT determines whether an article is obscene or indecent. The OAT does so as a court, possessing the powers and authority of a court.

the adjudicators system in the OAT with the jury system. There was however little deliberation of this issue among the public.

16. Some people suggested abolishing the OAT and asking the court to take up the classification role, though this might greatly increase the workload of the court. Some people have pointed out that, among the many cases handled by the OAT every year, only the classification of a very small number of them was controversial. Overall there did not appear to be a strong demand for abolishing the OAT.

17. The Consultant considers that maintaining the OAT, improving the composition of its membership and adjudication procedures would enhance the OAT's transparency, representativeness and consistency of its decisions. Regarding the administrative and judicial functions of the OAT, the Consultant considers it necessary for the Government to conduct further in-depth discussions with the relevant stakeholders.

(d) Classification System

18. The Ordinance provides for a three-tier classification system³. The respondents had less interest in this topic. Of those who expressed views, many supported the existing classification system and did not see a need for change. Some cautioned that introducing sub-classes under Class II would create confusion, cause enforcement problems and increase the cost of adjudication work. A few called for the abolition of Class III or the whole classification system but others disagreed. As the public do not seem to have a major concern about the existing classification system, the Consultant proposes that the Government may consider not covering this in the second round of public consultation.

(e) New Forms of Media

19. Regulation of new media has attracted extensive public discussions during the first round of consultation⁴. On the one hand,

³ At present, articles can be classified as Class I (neither obscene nor indecent), Class II (Indecent) and Class III (Obscene). Class I articles may be published without restriction. Class II articles must not be published to persons under the age of 18 and publication of such must comply with statutory requirements including sealing in wrappers and displaying a warning notice. Class III articles are prohibited from publication at all.

⁴ Currently, Television and Entertainment Licensing Authority (TELA) adopts a complaint-driven approach to deal with obscene and indecent content online. It works closely with the Hong Kong Internet Service Providers Association to implement a self-regulatory code of practice on the handling of indecent articles on the Internet. The code was promulgated in 1997 following

industry members and Internet users strongly opposed, both in principle and on technical grounds, any increased control over the Internet, particularly regarding verification of Internet users' age and requiring ISPs to provide filtering services. On the other hand, many members of the public, especially parents and educators, expressed concern about the impact of the Internet on youngsters through dissemination of obscene and indecent information and they supported enhanced regulation of the Internet.

20. The Consultant considers that in view of the public's concern and diverse views about the dissemination of information on the Internet, the Government should not make any decision in the absence of a clear tendency and sufficient discussion in the community, but should conduct further discussions on the subject with the stakeholders and members of the public in the second round of consultation.

(f) Enforcement

21. Enforcement work and priority are relatively technical on which the public have expressed relatively few views. The Consultant suggests that the relevant enforcement agencies should discuss this issue among themselves with a view to seeking operational improvement and the Government may consider not to cover this area in the second round of consultation.

(g) Penalty

22. There were not a lot of public discussions in this area. Of those who have expressed views, the majority supported heavier penalties in order to enhance deterrent effect against repeated offenders. Some pointed out that the penalties handed down by the court were usually lower than the maximum penalty set out in the Ordinance. The Consultant suggests that the Government should consider the feasibility of this approach, taking into account the discretionary power of the court in imposing sentences for individual cases.

(h) Publicity and public education

23. Almost all recognised the importance of publicity and public education, even though some people opined that publicity and public

industry and public consultation. If the content under complaint is likely to be obscene, TELA will refer it to the Police for follow up enforcement action, including prosecution.

education could not replace legislation. The Consultant considers that the Government should follow up on how to step up educational efforts.

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Commerce and Economic Development Bureau
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